

Aug 07, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HOLLY D.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 1:18-CV-03166-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney D. James Tree represents Holly D. (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed applications for Disability Insurance Benefits and
5 Supplemental Security Income on October 27, 2014, alleging disability since
6 October 26, 2014, due to a herniated disc in her lower back, rheumatoid arthritis,
7 and a deteriorating spine. Tr. 70, 250. The applications were denied initially and
8 upon reconsideration. Tr. 110-12, 118-29. Administrative Law Judge (ALJ) Larry
9 Kennedy held a hearing on June 6, 2017, Tr. 39-67, and issued an unfavorable
10 decision on July 5, 2017, Tr. 15-27. Plaintiff requested review from the Appeals
11 Council. Tr. 213. The Appeals Council denied Plaintiff's request for review on
12 June 26, 2018. Tr. 1-5. The ALJ's July 2017 decision thus became the final
13 decision of the Commissioner, which is appealable to the district court pursuant to
14 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on August 27,
15 2018. ECF No. 1, 4.

16 **STATEMENT OF FACTS**

17 Plaintiff was born in 1982 and was 32 years old as of the alleged onset date.
18 Tr. 25. She obtained her GED and attended culinary training through Job Corps.
19 Tr. 46-47, 251. She worked as a baker, a cashier, and a waitress. Tr. 48.

20 **STANDARD OF REVIEW**

21 The ALJ is responsible for determining credibility, resolving conflicts in
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
23 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
24 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
25 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
26 only if it is not supported by substantial evidence or if it is based on legal error.
27 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
28 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at

1 1098. Put another way, substantial evidence is such relevant evidence as a
2 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
3 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
4 rational interpretation, the Court may not substitute its judgment for that of the
5 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
6 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
7 administrative findings, or if conflicting evidence supports a finding of either
8 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
9 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
10 supported by substantial evidence will be set aside if the proper legal standards
11 were not applied in weighing the evidence and making the decision. *Browner v.*
12 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

13 **SEQUENTIAL EVALUATION PROCESS**

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
16 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
17 four, the burden of proof rests upon the claimant to establish a prima facie case of
18 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
19 met once a claimant establishes that a physical or mental impairment prevents the
20 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
21 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
22 to step five, and the burden shifts to the Commissioner to show that (1) the
23 claimant can make an adjustment to other work; and (2) the claimant can perform
24 specific jobs which exist in the national economy. *Batson v. Commissioner of*
25 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
26 an adjustment to other work in the national economy, the claimant will be found
27 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

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1 **ADMINISTRATIVE DECISION**

2 On July 5, 2017, the ALJ issued a decision finding Plaintiff was not disabled
3 as defined in the Social Security Act.

4 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
5 activity since October 26, 2014, the alleged onset date. Tr. 17.

6 At step two, the ALJ determined Plaintiff had the following severe
7 impairments: rheumatoid arthritis, thoracic and lumbar spine degenerative disc
8 disease, urologic disorder, skin disorder, and obesity. *Id.*

9 At step three, the ALJ found Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments. Tr. 19.

12 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
13 she could perform light exertion level work with the following limitations:

14 she is limited to frequent handling and fingering; she can occasionally
15 balance, stoop, and kneel; she is limited to no climbing or crawling;
16 and she must avoid concentrated exposure to vibration and hazards.
17 Tr. 20.

18 At step four, the ALJ found Plaintiff was capable of performing her past
19 relevant work as a pie maker, cashier, and waitress. Tr. 24-25.

20 Alternatively, at step five, the ALJ determined that, based on the testimony
21 of the vocational expert, and considering Plaintiff's age, education, work
22 experience, and RFC, Plaintiff was capable of making a successful adjustment to
23 other work that existed in significant numbers in the national economy, including
24 the jobs of housekeeping cleaner, production assembler, and storage facility rental
25 clerk. Tr. 25-26.

26 The ALJ thus concluded Plaintiff was not under a disability within the
27 meaning of the Social Security Act at any time from October 26, 2014, the alleged
28 onset date, through the date of the ALJ's decision, July 5, 2017. Tr. 26-27.

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Plaintiff contends the ALJ erred by (1) improperly rejecting medical opinion evidence; and (2) improperly rejecting Plaintiff's subjective statements.

1. Plaintiff's subjective statements

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment merely because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

The ALJ concluded Plaintiff's medically determinable impairments could reasonably be expected to cause some of her alleged symptoms; however, Plaintiff's statements concerning the intensity, persistence and limiting effects of those symptoms were not entirely consistent with the medical and other evidence of record. Tr. 19. The ALJ found Plaintiff's pain complaints to be inconsistent

1 with the objective medical evidence of record and found her testimony regarding
2 urinary issues to be inconsistent with other recent statements in the record. Tr. 21-
3 23.

4 The ALJ's reason for discounting Plaintiff's subjective complaints with
5 respect to her urinary symptoms is not supported by substantial evidence. Plaintiff
6 testified that she experienced persistent urges to relieve herself, and had to urinate
7 once or twice an hour, depending on her liquid intake. Tr. 57. She noted her
8 doctors were still working on finding the proper medication combination to address
9 the problem. Tr. 58. The ALJ found Plaintiff's testimony was inconsistent with
10 recent statements in the record indicating her urinary frequency and urgency
11 symptoms had improved with medication. Tr. 23. However, improvement in a
12 condition does not mean elimination of the condition. *Holohan v. Massanari*, 246
13 F.3d 1195, 1205 (9th Cir. 2001). The record reflects Plaintiff continued to have
14 symptoms, despite having some relief. Tr. 636, 640. Her medications were not
15 always effective, and thus were discontinued at times. Tr. 644, 640. Her urologist
16 continued to adjust her medications up through the month prior to the hearing. Tr.
17 636. The ALJ failed to cite to any evidence that indicates any inconsistency
18 between Plaintiff's testimony and the medical record evidence.

19 The only other reason the ALJ offered for discounting Plaintiff's testimony
20 was general inconsistency with the medical record. An ALJ may cite
21 inconsistencies between a claimant's testimony and the objective medical evidence
22 in discounting the claimant's symptom statements. *Bray v. Comm'r of Soc. Sec.*
23 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But this cannot be the only reason
24 provided by the ALJ. *See Lester*, 81 F.3d at 834 (the ALJ may not discredit the
25 claimant's testimony as to subjective symptoms merely because they are
26 unsupported by objective evidence). "[A]n ALJ does not provide specific, clear,
27 and convincing reasons for rejecting a claimant's testimony by simply reciting the
28 medical evidence in support of his or her residual functional capacity

determination.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015). The ALJ’s bullet-point discussion of the medical evidence (Tr. 21-23) does not constitute a clear and convincing discussion of the reasons he found Plaintiff’s pain complaints to be inconsistent with the record.

Because the ALJ failed to offer clear and convincing reasons for discounting Plaintiff’s subjective pain complaints, the decision is not supported by substantial evidence. Upon remand, the ALJ shall re-evaluate Plaintiff’s testimony and reassess what statements, if any, are not consistent with the medical evidence and other evidence in the record, and what specific evidence undermines those statements.

2. Medical opinion evidence

Plaintiff argues the ALJ erred by failing to properly consider the medical opinion evidence of record. ECF No. 13 at 6-14. Plaintiff specifically asserts the ALJ erred by disregarding the opinions from her treating provider Sonya Starr, ARNP, and DSHS reviewing doctor Myrna Palasi, MD. *Id.*

A. Sonya Starr, ARNP

An ALJ may discount the opinion of an “other source,” such as a nurse practitioner, if he provides “reasons germane to each witness for doing so.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

Plaintiff’s treating nurse, Sonya Starr, completed a medical source statement on May 8, 2015. Tr. 390-91. She opined continuing to work as a baker on a regular basis would worsen Plaintiff’s back pain. Tr. 391. She further stated that it was more probable than not that if Plaintiff attempted to work a full-time schedule, she would miss work four or more days per month due to increased pain. *Id.*

The ALJ gave this opinion “slight weight,” finding it to be inconsistent with objective findings and inconsistent with another treating provider’s opinion. Tr. 24.

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1 While consistency with the record is a factor that may be considered in
2 assessing the weight to be given to a treating source, 20 C.F.R. §§ 404.1527(c)(4),
3 404.1527(f), substantial evidence does not support the ALJ's conclusion that Ms.
4 Starr's opinion is inconsistent with the objective findings. The ALJ indicated the
5 opinion was inconsistent with evidence in the record that Plaintiff was ambulatory
6 during physical exams and had normal gait and range of motion in her back. Tr.
7 24. It is not clear that these objective findings are inconsistent with Ms. Starr's
8 opinion. She commented only on the increased back pain Plaintiff would
9 experience and did not state that Plaintiff was unable to walk or had limited range
10 of motion. Therefore, the objective findings identified by the ALJ as examples of
11 inconsistency do not actually demonstrate inconsistency with Ms. Starr's opinion.

12 Similarly, PAC Michael Urakawa's opinion is not inconsistent with Ms.
13 Starr's opinion. On April 4, 2016, Mr. Urakawa noted he would not complete
14 disability paperwork with respect to Plaintiff's back condition until she had
15 completed a physical capacity evaluation, and he stated, "We cannot certify she
16 cannot work the rest of her life." Tr. 532. Neither of these statements are
17 inconsistent with Plaintiff experiencing increased pain if she attempted to work full
18 time. Indeed, Mr. Urakawa did not comment on Plaintiff's physical capacity at all.
19 Therefore, the ALJ's conclusion that these two opinions are in some way
20 contradictory is not supported by substantial evidence.

21 The ALJ failed to offer any germane reason for discounting Ms. Starr's
22 opinion. On remand, the ALJ will reconsider this opinion along with the entire
23 medical record.

24 **B. Myrna Palasi, MD**

25 Plaintiff asserts the ALJ erred in rejecting the opinion of reviewing doctor
26 Myrna Palasi, MD. ECF No. 13 at 12-14.

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1 The Commissioner may reject the opinion of a non-examining physician by
2 reference to specific evidence in the medical record. *Sousa v. Callahan*, 143 F.3d
3 1240, 1244 (9th Cir. 1998).

4 On November 19, 2014, Dr. Myrna Palasi reviewed Plaintiff's medical
5 records for the Washington State Department of Social and Health Services. Tr.
6 417. Dr. Palasi opined Plaintiff would be limited to a less than sedentary RFC. *Id.*

7 The ALJ gave little weight to Dr. Palasi's opinion, noting Plaintiff had only
8 recently reestablished care following a hiatus from treatment, and that subsequent
9 records indicated improvement in her rheumatoid arthritis symptoms. Tr. 23-24.
10 The ALJ also noted physical exams indicated no motor weakness and intact gait,
11 and that the opinion was inconsistent with Plaintiff's reported activities. Tr. 24.

12 As noted above, general consistency with the record is a legitimate factor for
13 an ALJ to consider in weighing the reliability of a medical opinion. 20 C.F.R. §
14 404.1527(c)(4). An ALJ may also consider a claimant's activities in evaluating
15 medical opinion evidence. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).
16 However, because the claim is being remanded on other bases, the ALJ shall
17 reconsider Dr. Palasi's opinion in evaluating the medical evidence as a whole.

18 CONCLUSION

19 Plaintiff argues the ALJ's decision should be reversed and remanded for the
20 payment of benefits. The Court has the discretion to remand the case for additional
21 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
22 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
23 further administrative proceedings would serve no useful purpose. *Id.* Remand is
24 appropriate when additional administrative proceedings could remedy defects.
25 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
26 finds that further development is necessary for a proper determination to be made.

27 The ALJ's RFC determination is not supported by substantial evidence and
28 must be reevaluated. On remand, the ALJ shall reassess the medical evidence,

reevaluate Plaintiff's subjective complaints, formulate a new RFC, obtain supplemental testimony from a vocational expert, if necessary, and take into consideration any other evidence or testimony relevant to Plaintiff's disability claim.

Accordingly, **IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED, IN PART.**

2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

3. The matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

4. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED.**

IT IS SO ORDERED.

DATED August 7, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE